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An Examination of the California Fireman's Rule

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An Examination Of The California Fireman's Rule

The 1968 decision in *Giorgi v. Pacific Gas & Electric Co.*[1] brought California into agreement with an overwhelming majority of jurisdictions[2] which maintain that a paid fireman has no cause of action against one whose negligence[3] caused the fire in which he was injured. While the historical roots of this "fireman's rule" have been heavily entwined in the theories of land-occupier immunity and assumption of risk,[4] the rationale utilized by the California court was that of public policy.[5] If the California rule is to be based on public policy considerations and not merely on *stare decisis*, this rationale merits closer scrutiny. This comment examines the modern justifications for the fireman's rule and considers its continued viability in California in light of countervailing considerations of public policy. Since firemen are barred by the rule from recovering for injuries sustained as a result of their employment while other similarly situated public employees are not, this comment also examines an equal protection challenge to the validity of the fireman's rule in California.

Historical Development of the Rule

The courts originally approached the issue of liability to firemen as they did the liability of land-occupiers in general,[6] that is, by classifying those entering onto premises as either trespassers, licensees, or invitees and graduating accordingly the duties owed.[7] Since firemen entered

1. 266 Cal. App. 2d 355, 72 Cal. Rptr. 119 (1968).

2. *E.g.*, Romedy v. Johnston, 193 So. 2d 487 (Fla. Ct. App. 1967); Netherton v. Arends, 81 Ill. App. 2d 391, 225 N.E.2d 143 (1967); Buren v. Midwest Indus., Inc., 380 S.W.2d 96 (Ky. Ct. App. 1964); Aravanis v. Eisenberg, 237 Md. 242, 206 A.2d 148 (1965); Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N.W.2d 549 (1951); Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960); Jackson v. Velveray Corp., 82 N.J. Super. 469, 198 A.2d 115 (App. Div. 1964); McGee v. Adams Paper & Twine Co., 26 App. Div. 2d 186, 271 N.Y.S.2d 698 (1966).

3. 266 Cal. App. 2d at 360, 72 Cal. Rptr. at 123. "We do not deal with the arsonist or with one who prankishly or maliciously turns in a false alarm." *Id.*

4. See text accompanying notes 6-30 *infra*.

5. 266 Cal. App. 2d at 359, 72 Cal. Rptr. at 122.

6. *See, e.g.*, Roberts v. Rosenblatt, 146 Conn. 110, 148 A.2d 142 (1959); Baxley v. Williams Constr. Co., 98 Ga. App. 662, 106 S.E.2d 799 (1958); Wax v. Co-operative Refinery Ass'n, 154 Neb. 805, 49 N.W.2d 707 (1951).

7. 2 F. Harper & F. James, The Law of Torts §27.1, at 1430-32 (1956) [hereinafter cited as Harper & James]; Restatement (Second) of Torts §§328E-350 (1965).

under a right conferred by virtue of their duty to the public, they did not easily fit into this rigid[8] and arbitrary[9] classification system and thus presented the courts with a dilemma in the establishment of the correct level of duty owed to them.[10] The first case to address this issue held that a fireman entering onto private premises in the performance of his public duty was a mere licensee to whom no duty was owed other than that of refraining from the willful or wanton infliction of injuries.[11] The wisdom of this decision is questionable not only because it may have been based upon a misconception as to the sense in which its cited authority[12] defined the term licensee, but also because the result is anomalous. The privilege of firemen to enter onto premises

> is *independent* of any permission, consent or license of the occupier, and they would be privileged to enter, and would insist upon doing so, even if he made active objection. They normally do not come for any of the purposes for which the premises are held open to the public, and frequently, upon private premises, they do not enter for any benefit of the occupier, or under circumstances which justify any expectation that the place has been prepared to receive them.[13]

Despite the lack of an appropriate basis for the classification of firemen as licensees, this rule [hereinafter referred to as the original fireman's rule] prevailed, and its application negated occupier liability for the two broad categories of injuries sustained by firemen: those resulting from defects in the premises not related to the fire, and those sustained as a result of the occupier's negligence in creating the condition neces-

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8. HARPER & JAMES, *supra* note 7, §27.14, at 1498.

9. W. PROSSER, HANDBOOK OF THE LAW OF TORTS §61, at 396 (4th ed. 1971) [hereinafter cited as PROSSER].

10. It is a curious fact that until the question of the right of policemen, firemen and other governmental officials to recover for injuries caused by the defective condition of private premises which their official duties required them to enter came before the American courts, no case had required any court to pass on the question of the duty of a landowner toward those who entered his property in the exercise of some right or privilege thereover, which was itself in derogation of the otherwise complete right of an owner to exclude from his land any one he saw fit.

Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 340, 342-43 (1921).

11. Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182 (1892). The rule announced in this case was also utilized in denying liability to policemen in analogous situations. *E.g.*, Louisville & N.R.R. Co. v. Griswold, 241 Ala. 104, 1 So. 2d 393 (1941) Schuerer v. Trustees of Open Bible Church, 175 Ohio St. 163, 192 N.E.2d 38 (1963); Kithcart v. Feldman, 89 Okla. 276, 215 P. 419 (1923); Cook v. Demetrakas, 275 A.2d 919 (R.I. 1971).

12. T. COOLEY, TORTS 313 (1st ed. 1880), *cited in* Gibson v. Leonard, 143 Ill. 182, 183, 32 N.E. 182, 183 (1892). *See* Comment, *Are Firemen and Policemen Licensees or Invitees?*, 35 MICH. L. REV. 1157, 1159 (1937).

13. PROSSER, *supra* note 9, §61, at 396 (emphasis added); *see* Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U .PA. L. REV. 340, 344 (1921).

sitating the fireman's presence.[14]

The steadfast refusal by the courts to accord firemen invitee status was apparently motivated by a concern that the imposition of a duty to make the premises reasonably safe for one whose visits were unpredictable and infrequent would place too severe a burden on the occupier.[15] This judicial concern, however, was unwarranted since application of the foreseeability-of-harm element of actionable negligence would require the occupier to take only reasonable precautions against foreseeably unreasonable danger.[16] Dangers would not have to be removed from places where they would not likely be encountered, and pitfalls would not be unreasonable in places where entrants could be expected to find and avoid them.[17] The courts grew increasingly cognizant of this misplaced concern for the occupier's burden since the original fireman's rule often led to harsh results for firemen.[18] Eventually the rule became laced with exceptions that tended to bring it in line with general principles of negligence,[19] and accordingly occupiers were held liable to firemen for active negligence,[20] breach of a statutory duty,[21] failure to warn of hidden dangers,[22] and for negligent maintenance of an approach prepared for those entitled to enter.[23]

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14. *See* Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 237, 237 (1921).

15. *See, e.g.*, Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 397, 45 N.W.2d 549, 551 (1951); Boneau v. Swift & Co., 66 S.W.2d 172, 173 (Mo. App. 1934); 26 COLUM. L. REV. 116 (1926); 22 MINN. L. REV. 898 (1938). For a discussion of *Shypulski v. Waldorf Paper Products Co.* see 35 MINN. L. REV. 512 (1951); 12 U. PITT. L. REV. 646 (1951).

16. HARPER & JAMES, *supra* note 7, §27.14, at 1501-02. *See* PROSSER, *supra* note 9, §61, at 397-98.

17. HARPER & JAMES, *supra* note 7, §27.14, at 1502. *See* Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Cameron v. Abatiell, 127 Vt. 111, 241 A.2d 310 (1968).

18. *E.g.*, Dini v. Naiditch, 20 Ill. 2d 406, 414, 170 N.E.2d 881, 884 (1960); Mulcrone v. Wagner, 212 Minn. 478, 482, 4 N.W.2d 97, 99 (1942); Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 5, 80 N.W. 693, 694 (1899).

19. HARPER & JAMES, *supra* note 7, §27.14, at 1505.

20. *E.g.*, Buren v. Midwest Industries, Inc., 380 S.W.2d 96 (Ky. 1964); Anderson v. Cinnamon, 365 Mo. 304, 282 S.W.2d 445 (1955).

21. *E.g.*, Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Arvanis v. Eisenberg, 237 Md. 242, 206 A.2d 148 (1965); McGee v. Adams Paper & Twine Co., 26 App. Div. 2d 186, 271 N.Y.S.2d 698 (1966). *Contra, e.g.*, Aldworth v. F.W. Woolworth Co., 295 Mass. 344, 3 N.E.2d 1008 (1936); Wax v. Co-operative Refinery Ass'n, 154 Neb. 805, 49 N.W.2d 707 (1951).

22. *E.g.*, Netherton v. Arends, 81 Ill. App. 2d 391, 225 N.E.2d 143 (1967); Aravanis v. Eisenberg, 237 Md. 242, 206 A.2d 148 (1965); Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N.W.2d 549 (1951); Beedenbender v. Midtown Properties, Inc., 4 App. Div. 2d 276, 164 N.Y.S.2d 276 (1957).

23. *E.g.*, Meiers v. Fred Kock Brewery, 229 N.Y. 10, 127 N.E. 491 (1920); Beedenbender v. Midtown Properties, Inc., 4 App. Div. 2d 276, 164 N.Y.S.2d 276 (1957). *See* Comment, *Liability of Property Owners Towards Policemen and Firemen*, 25 ALBANY L. REV. 105 (1961); Note, *Landowner's Negligence Liability to Persons Entering as a Matter of Right or Under a Privilege of Private Necessity*, 19 VAND. L. REV. 407, 409-17 (1966); 28 CORNELL L.Q. 232 (1943); 34 HARV. L. REV. 87 (1920); 30 YALE L.J. 93 (1920-21).

Several jurisdictions rejected the label of licensee and declared firemen to be *sui generis*,[24] though with little change in the duty owed to them,[25] and a few jurisdictions classified firemen as invitees, thereby imposing the common law duty of reasonable care.[26]

Although the courts allowed some expansion of liability under the fireman's rule, they displayed a marked reluctance to impose liability upon anyone, whether occupier or nonoccupier, whose only negligence was to cause the fire which necessitated the fireman's presence and proximately caused his injury.[27] This reluctance resulted in the creation of a second fireman's rule which denied a fireman a cause of action against one whose negligence caused the fire in which he was injured. The rationale for this rule has been expressed either in terms of a distinct limitation on the duty owed firemen based on public policy,[28] or in terms of a defense based on assumption of risk.[29] This rule has won almost universal acceptance[30] and is the most formidable barrier to a fireman's recovery.

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24. *E.g.*, Buren v. Midwest Industries, Inc., 380 S.W.2d 96 (Ky. Ct. App. 1964); Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N.W.2d 549 (1951); Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960).

25. [T]he owner is obliged to use reasonable care to keep in safe condition those parts of the premises which are utilized as the ordinary means of access for all persons entering thereon . . . [and] if the owner knows of the presence on the premises of officially privileged persons, such as firemen or policemen, is cognizant of a dangerous condition thereon, and has reason to believe that they are unaware of the danger, he has a duty to warn them of the condition and of the risk involved.

Beedenbender v. Midtown Properties, Inc., 4 App. Div. 2d 276, 281, 164 N.Y.S.2d 276, 281 (1957) (citations omitted). This is the same level of duty adopted by the Restatement of Torts for licensees. RESTATEMENT (SECOND) OF TORTS §§342-345 (1965).

26. Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Horcher v. Guerin, 94 Ill. App. 2d 244, 236 N.E.2d 576 (1968); Netherton v. Arends, 81 Ill. App. 2d 391, 225 N.E.2d 143 (1967); Strong v. Seattle Stevedore Co., 1 Wash. App. 898, 466 P.2d 545 (1970). *See* Cameron v. Abatiell, 127 Vt. 111, 241 A.2d 310 (1968). For a discussion of the *Dini v. Naiditch* decision see 38 CHI.-KENT L. REV. 75 (1961); 47 CORNELL L.Q. 119 (1961); 14 VAND. L. REV. 1541 (1961).

27. Note, *Landowner's Negligence Liability to Persons Entering as a Matter of Right or Under a Privilege of Private Necessity*, 19 VAND. L. REV. 407, 419 (1966).

The general rule as to the nonliability of an owner or occupant to a paid fireman for negligence is often stated in terms of nonliability for negligence in *creating* or *starting* a fire. However, it seems clear that on principle such rule . . . extends not only to negligence in creating or starting the fire but also includes negligence related to the spread of the fire, such as ordinary negligence in housekeeping which tends to promote the spread of a fire after its inception from other causes. Indeed, the two situations are often indistinguishable.

Jackson v. Velveray Corp., 82 N.J. Super. 469, 475, 198 A.2d 115, 118 (App. Div. 1964) (citations omitted and emphasis added).

28. *E.g.*, Romedy v. Johnston, 193 So. 2d 487 (Fla. Ct. App. 1967); Buren v. Midwest Industries, Inc., 380 S.W.2d 96 (Ky. Ct. App. 1964); Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960).

29. *E.g.*, Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N.W.2d 549 (1951); Walsh v. Madison Park Properties, Ltd., 102 N.J. Super. 134, 245 A.2d 512 (1968); Spencer v. B.P. John Furniture Corp., 255 Ore. 359, 467 P.2d 429 (1969); Chesapeake & O.R.R. v. Crouch, 208 Va. 602, 159 S.E.2d 650 (1968), *cert. denied*, 393 U.S. 845 (1969); Hass v. Chicago & N.W. Ry., 48 Wis. 2d 321, 179 N.W.2d 885 (1970).

30. See cases cited note 2, *supra*.

THE CALIFORNIA FIREMAN'S RULE

California never formally adopted the original fireman's rule,[31] and any chance of its doing so was foreclosed by the California Supreme Court's 1968 decision in *Rowland v. Christian.*[32] *Rowland* abolished the inflexible trespasser-licensee-invitee classification system for land-occupier liability, upon which the original fireman's rule was based, in favor of an approach which emphasizes foreseeability of injury to others.[33] The *Rowland* court held that section 1714 of the California Civil Code constitutes the sole basis for a negligence action,[34] and that "[t]he proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others . . . ."[35] Under a strict application of this test, an occupier would apparently be liable to a fireman injured by a defect in the premises unrelated to the fire in those situations in which there existed a foreseeable risk of injury. Further, since it is foreseeable that a negligently caused fire could result in injuries to a fireman, a duty to use care to prevent such an occurrence would seem to exist.[36] The *Rowland* court, however, recognized that an exception to the existence of a duty might arise: "[I]t is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made *unless clearly supported by public policy.*"[37] The court proceeded to outline broad cri-

31. Giorgi v. Pacific Gas & Elec. Co., 266 Cal. App. 2d 355, 357, 72 Cal. Rptr. 119, 121 (1968). Two California cases are sometimes erroneously cited as authority for the original fireman's rule, to wit, Pennebaker v. San Joaquin Light & Power Co., 158 Cal. 579, 112 P. 459 (1910) (antecedent negligence towards a fireman), *cited in* Annot., 86 A.L.R.2d 1205, 1209 (1962), and Wilson v. Union Iron Works Dry Dock Co., 167 Cal. 539, 140 P. 250 (1914) (customs collector), *cited in* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §582, at 2850 (8th ed. 1974).

32. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

33. *Id.* at 112-19, 443 P.2d at 564-68, 70 Cal. Rptr. at 100-04. *See also* Fitch v. LeBeau, 1 Cal. App. 3d 320, 81 Cal. Rptr. 722 (1969).

34. Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself . . . .
CAL. CIV. CODE §1714.

35. 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

36. "That the misfortune here experienced by a fireman was well within the range of foreseeability cannot be disputed." Krauth v. Geller, 31 N.J. 270, 273, 157 A.2d 129, 130 (1960). *See* National Sur. Corp. v. Travelers Ins. Co., 149 So. 2d 438, (La. Ct. App. 1963); Utah Home Fire Ins. Co. v. Leonard, 100 So. 2d 259 (La. Ct. App. 1958); Benton v. Montague, 253 N.C. 695, 117 S.E.2d 771 (1961); Schafer v. Wells, 171 Ohio St. 506, 172 N.E.2d 708 (1961). *See generally* Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968); Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958); Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (1963).

37. 69 Cal. 2d at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100 (citations omitted and emphasis added).

teria that would determine whether an exception should apply:

> A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[38]

Although the fireman's rule creates an exception to the general liability principle reaffirmed in *Rowland*, its adoption in *Giorgi v. Pacific Gas & Electric Co.*[39] was not predicated upon an analysis of the criteria that *Rowland* set forth for determining whether such an exception should be made.

In *Giorgi*, the jury determined that defendant Pacific Gas and Electric Company's negligent maintenance of a pole and wires caused a forest fire and found defendant liable for the deaths and injuries sustained when a sudden turn of the fire trapped six federal employees, all of whom were trained and required to fight forest fires as part of their duties.[40] The court of appeal reversed this decision after expressly adopting the second fireman's rule. The court held that "a paid fireman has no cause of action against one whose *passive* negligence caused the fire in which he was injured."[41] This rule was subsequently expanded in the case of *Scott v. E.L. Yeager Construction Co.*,[42] wherein another court of appeal, in a situation factually analogous to *Giorgi*,[43] discarded *Giorgi*'s active-passive negligence dichotomy after noting that it originated in the abrogated licensee distinction which was no longer manageable or beneficial as a tool of tort analysis.[44]

When the *Giorgi* court adopted the second fireman's rule, the traditional scheme of determining occupier liability based upon classification of the entrant was no longer extant; moreover, it would not have been applicable since the fire did not occur on the defendant's prop-

38. *Id.* at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100 (citations omitted).
39. 266 Cal. App. 2d 355, 72 Cal. Rptr. 119 (1968).
40. *Id.* at 356-57, 72 Cal. Rptr. at 120.
41. *Id.* at 360, 72 Cal. Rptr. at 123 (emphasis added).
42. 12 Cal. App. 3d 1190, 91 Cal. Rptr. 232 (1970).
43. In *Scott*, plaintiff fireman was severely burned when an explosion occurred as repairs were being completed on a gas line ruptured by the negligent act of the defendant construction company. *Id.* at 1192-94, 91 Cal. Rptr. at 233-34.
44. *Id.* at 1196, 91 Cal. Rptr. 236.

erty.[45] Equally unavailable as a rationale for the fireman's rule was the defense of assumption of risk, since in California one under a duty to act cannot and does not assume the risk.[46] The *Giorgi* court thus turned to public policy considerations in justifying its adoption of the fireman's rule in California.[47] If the California rule is to be based on public policy considerations and not merely a false allegiance to land-occupier immunities,[48] the policy arguments merit closer scrutiny in light of the criteria established by the *Rowland* court for determining whether an exception to the existence of a duty exists.[49]

The Rationale for the California Fireman's Rule

In denying recovery to the plaintiff firemen, both the *Giorgi* and *Scott* courts relied heavily on *Krauth v. Geller*,[50] a 1960 decision of the New Jersey Supreme Court, which *Giorgi* characterized "as being entirely modern in its approach to tort law."[51] The *Krauth* court approached the question of whether a fireman could recover from an owner or occupier of land for negligence in the creation of a fire by positing that "[t]he question is ultimately one of public policy, and the answer must be distilled from the relevant factors involved upon an inquiry into what is *fair* and just."[52] Having predicated its analysis on public policy considerations, the court proceeded to adopt the fireman's rule by holding that "[i]n terms of duty, it may be said there is none owed the fireman to exercise care so as not to require the special services for which he is trained and paid."[53] The court underscored the primary element of its public policy rationale by stating:

> [I]n the final analysis the policy decision is that it would be *too burdensome* to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created,

45. 266 Cal. App. 2d at 357, 72 Cal. Rptr. at 120-21. See text accompanying notes 32-33 *supra*.

46. Vierra v. Fifth Ave. Rental Serv., 60 Cal. 2d 266, 383 P.2d 777, 32 Cal. Rptr. 193 (1963); Rogers v. Los Angeles Transit Line, 45 Cal. 2d 414, 289 P.2d 226 (1955); Bilyeu v. Standard Freight Lines, 182 Cal. App. 2d 536, 6 Cal. Rptr. 65 (1960). *Cf.* Restatement (Second) of Torts §496E, comment *c* (1965). *See also* Solgaard v. Atkinson Co., 6 Cal. 3d 361, 491 P.2d 821, 99 Cal. Rptr. 29 (1971).

47. 266 Cal. App. 2d at 359, 72 Cal. Rptr. at 122, *quoting* Krauth v. Geller, 31 N.J. 270, 273, 157 A.2d 129, 130 (1960).

48. "There is little doubt that the rule originated in the land occupier cases." Scott v. E.L. Yeager Constr. Co., 12 Cal. App. 3d 1190, 1194-95, 91 Cal. Rptr. 232, 235 (1970) (citations omitted).

49. See text accompanying note 38 *supra*.

50. 31 N.J. 270, 157 A.2d 129 (1960).

51. Giorgi v. Pacific Gas & Elec. Co., 266 Cal. App. 2d 355, 359, 72 Cal. Rptr. 119, 122 (1968).

52. 31 N.J. at 273, 157 A.2d at 130 (emphasis added).

53. *Id.* at 274, 157 A.2d at 131.

> occurrences. Hence, for that risk the fireman should receive appropriate compensation from the public he serves, both in pay which reflects the hazard and in workmen's compensation benefits for the consequences of the inherent risks of the calling.[54]

The *Giorgi* and *Scott* courts, in adopting the California fireman's rule, followed *Krauth*'s example and predicated their holdings upon analyses of public policy considerations. The *Scott* court, however, in its "resolution of the significant policy considerations underlying the 'fireman's rule,' "[55] seized upon *Krauth*'s premise that the fireman's rule evolves from "an inquiry into what is fair and just"[56] as a separate "fairness" basis for the rule, independent of the public policy basis.[57] It appears that *Scott*'s reliance on *Krauth* for this differentiation in bases for the fireman's rule is misplaced since the *Krauth* court framed its adoption of the rule solely in terms of public policy and treated the "fairness" consideration merely as an element of this analysis. Thus, the fairness consideration can more appropriately be characterized as an element of the public policy rationale for the fireman's rule rather than a basis in and of itself. In the final analysis, *Krauth*'s fairness consideration, which was seemingly elevated to artificial import by *Scott*, is simply a restatement, or conclusion, of the public policy considerations which underlie the fireman's rule as it has evolved in California and New Jersey.

As partial justification for its adoption of the fireman's rule, the *Giorgi* court incorporated the "too burdensome" language of *Krauth*[58] into a public policy argument relating to distribution of the cost of compensating for firemen's injuries.[59] The gist of this argument is that injuries to firefighters are both inevitable and prevalent and should be borne by the public as an incident of community living. The *Giorgi* court recognized this position as being consistent with the modern tort law policy of "spreading the risk"; the defendant taxpayer has paid a pro rata share for fire protection, and any injuries incurred in fighting negligently created fires should be considered a part of the cost of fire protection and paid out of the public fund.[60]

Having utilized the *Krauth* opinion in the formulation of a public policy consideration relating to distribution of cost, the *Giorgi* court

54. *Id.* (citations omitted and emphasis added).
55. 12 Cal. App. 3d at 1194, 91 Cal. Rptr. at 235.
56. See text accompanying note 52 *supra.*
57. 12 Cal. App. 3d at 1195, 91 Cal. Rptr. at 235.
58. See text accompanying note 54 *supra.*
59. 266 Cal. App. 2d at 360, 72 Cal. Rptr. at 122.
60. *Id. See* HARPER & JAMES, *supra* note 7, §27.14, at 1503-04.

promulgated another policy consideration pertaining to the efficient administration of justice:

> The great majority of fires doubtless are caused by or contributed to by passive human negligence. Most fires of any consequence result in injury, happily many of them rather minor, to some firemen. Judicial determination of the cause of a fire, after its destruction has been wrought, presents difficult problems requiring lengthy trials.[61]

The court expressed further concern for the efficient administration of justice by asking:

> What of obvious expansions of such a rule of liability if adopted? Would an ambulance driver, responding to a call to pick up victims of an automobile collision caused by negligence, be allowed recovery from the negligent driver in that first collision for injuries sustained by the speeding ambulance driver in an accident enroute to the scene? What of an attendant or nurse in the contagious disease ward of a public hospital? Would he be permitted recovery for an illness contracted from a patient confined in that ward because of disease contracted through the patient's negligent exposure of himself to the infection which caused his own confinement?[62]

The two public policy considerations of distribution of cost and efficient administration of justice delineated in *Giorgi* are outwardly compelling, but a more thorough analysis discloses countervailing considerations that call into question the continued viability of the California fireman's rule.

The Continued Viability of the California Fireman's Rule

A. The Public Policy Challenge

As previously indicated,[63] the California Supreme Court in *Rowland v. Christian* reaffirmed the "general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances . . . ."[64] In stating this principle, however, the court acknowledged that an exception could be made if it were "clearly supported by public policy," which is to be discerned by a balancing of several considerations enumerated by the court.[65] Since the fireman's rule creates an exception to the general principle that an individual must exercise reasonable care under the circumstances, *Rowland* requires

61. 266 Cal. App. 2d at 360, 72 Cal. Rptr. at 122.
62. *Id.* at 360, 72 Cal. Rptr. at 122-23.
63. See text accompanying note 33 *supra.*
64. 69 Cal. 2d at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100.
65. See text accompanying notes 37-38 *supra.*

that the rule's validity be examined in light of criteria[66] it promulgated for determining whether a departure from the general principle is justified.

The first two considerations set forth in *Rowland*, which seem closely related in the present context, are "the foreseeability of harm to the plaintiff [and] the degree of certainty that the plaintiff suffered injury . . . ."[67] Both of these factors seem to suggest a public policy stance contrary to that embodied in the fireman's rule, since it seems sufficiently foreseeable that negligent maintenance of one's property may lead to a fire which will injure those called upon to control it.[68] This is illustrated by the fact that there is no limitation on a defendant's liability to nonfiremen for injuries suffered as a result of a negligently started fire. Thus one injured while attempting to protect his own property from the consequences of the defendant's negligence,[69] or while acting as a mere volunteer,[70] may recover. Furthermore, if lack of foreseeability of injury to firemen was a legitimate factor supporting the fireman's rule, it would seem logical that a fireman would be denied a cause of action for *any* negligently inflicted injury suffered in the performance of his duties.[71] This is not the case, since an injured fireman may recover against a third party for an injury caused by a defective product used in the course of firefighting[72] or for an injury not directly related to a fire.[73] The *Giorgi* court itself lent support to the argument that foreseeability is not a limitation to a fireman's recovery in stating that "[m]ost fires of any consequence result in injury . . . to some firemen."[74] This language also bears directly upon the second *Rowland* consideration, certainty of injury,[75] which likewise

66. See text accompanying note 38 *supra*.
67. See text accompanying note 38 *supra*.
68. See note 36 *supra*.
69. *E.g.*, Haverstick v. Southern Pac. Co., 1 Cal. App. 2d 605, 37 P.2d 146 (1934); Esposito v. Christopher, 166 Colo. 361, 443 P.2d 731 (1968); Illinois Cent. R.R. v. Siler, 229 Ill. 390, 82 N.E. 362 (1907); Glanz v. Chicago, M. & St. P.R. Co., 119 Iowa 611, 93 N.W. 575 (1903); St. Louis S.R.R.R. v. Ginn, 264 P.2d 351 (Okla. 1953). *See* RESTATEMENT (SECOND) OF TORTS §445 (1965).
70. *E.g.*, Pike v. Grand Trunk Ry., 39 F. 255 (1st Cir. 1889); Liming v. Illinois Cent. R.R., 81 Iowa 246, 47 N.W. 66 (1890); Burnett v. Connor, 299 Mass. 604, 13 N.E.2d 417 (1938); Superior Oil Co. v. Richmond, 172 Miss. 407, 159 So. 850 (1935).
71. The same result should obtain if, as the *Giorgi* court envisioned, the cost of fire protection is to be borne by the public. See text accompanying note 60 *supra*.
72. Kreger v. Diener Mfg. Co., 321 Ill. App. 302, 53 N.E.2d 26 (1944) (exploding fire extinguisher); Dysko v. Mack Int'l Motor Truck Corp., 142 N.Y.S.2d 699 (Sup. Ct. 1955) (defective ladder).
73. *E.g.*, Norwood Transp. Co. v. Crossett, 207 Ala. 222, 92 So. 461 (1922); Matteoni v. Pacific Gas & Elec. Co., 53 Cal. App. 2d 260, 127 P.2d 574 (1942); Howard v. Clark, 29 Cal. App. 2d 374, 84 P.2d 529 (1938); Bencich v. Market St. Ry., 20 Cal. App. 2d 518, 67 P.2d 398 (1937); Malone v. Kansas City Rys., 232 S.W. 782 (Mo. App. 1921); Hartnett v. Standard Furniture Co., 162 Wyo. 655, 299 P. 408 (1931).
74. 266 Cal. App. 2d at 360, 72 Cal. Rptr. at 122.
75. See text accompanying note 38 *supra*.

seems to suggest that public policy does not support the exception to liability created by the fireman's rule. The certainty of injury consideration is bolstered by statistics on firemen's injuries which show that the job of a fire fighter is one of the nation's most hazardous. The fireman faces a mortality rate due to work accidents five times that of the average worker, and an average injury-severity rate four to five times that for manufacturing.[76]

An examination of *Rowland*'s third criterion, the "closeness of the connection between the defendant's conduct and the injury suffered . . . ,"[77] also leads to the conclusion that public policy does not support an exception to the general liability principle in the case of firemen. In addition, this third criterion points to the fundamental illogic underlying the fireman's rule. For the fireman's rule to apply at all, the defendant's conduct in negligently causing a fire must be directly connected to the fireman's injury.[78] This brings one to the anomalous result that the closeness of the connection between the defendant's conduct and the injury suffered by the fireman, which under *Rowland*'s analysis would support the existence of a duty owed to firemen, operates as a prerequisite to application of the fireman's rule, which eviscerates any such duty.

Another consideration suggested by *Rowland* as pertinent to the creation of an exception to the general liability principle is "the policy of preventing future harm."[79] This consideration, like the three already discussed, indicates that liability ought to be imposed on one who negligently causes a fire. If an injured fireman has no cause of action, a negligent party will be held financially responsible for the fireman's loss only to the extent that his taxes cover fire services and public employee compensation programs. Since property taxes are paid in relation to the assessed value of one's property and not in relation to the risk one creates on his property,[80] one who negligently maintains his property likely contributes taxes disproportionate to the potential burden the property imposes on the public fund. The fireman's rule thus provides little economic incentive to the owners of "fire traps" to maintain their premises in a reasonably firesafe condition.[81] Fire pre-

76. STANLEY H. RUTTENBERG & ASSOCIATES, INC., ECONOMIC JUSTICE: THE NEEDS OF FIRE FIGHTERS 19-25 (1970). *See Hearings on Death and Disability Benefits for Policemen and Firemen Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 92nd Cong., 2nd Sess., ser. 31 (1972).

77. See text accompanying note 38 *supra.*

78. Scott v. E.L. Yeager Constr. Co., 12 Cal. App. 3d 1190, 1199, 91 Cal. Rptr. 232, 238 (1970).

79. See text accompanying note 38 *supra.*

80. *See* CAL. REV. & TAX. CODE §401.

81. *See* AMERICA BURNING: THE REPORT OF THE NATIONAL COMMISSION ON FIRE

vention is much less costly than fire suppression,[82] and anything which adds to the public awareness of this factor may help to reduce the already serious and steadily worsening fire problem in this country.[83] Thus abolition of the fireman's rule would comport with *Rowland*'s policy of preventing future harm, both by creating an additional monetary incentive to reduce fire hazards and by increasing public awareness of the worsening fire problem.

Another criterion set forth in *Rowland* involves "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach . . . ."[84] Close examination of this consideration would also indicate that the fireman's rule is not supported by the public policy exception outlined in *Rowland*. The standard of care which would be imposed if the fireman's rule were abolished would be that of "reasonable care in the circumstances,"[85] and *Rowland* itself found the burden created by imposition of this standard to be insufficient to justify an exception to liability in the case of land occupiers: "The burden . . . may often be great . . . but it by no means follows that this is true in every case."[86] It may also be questioned whether *any* greater burden would be imposed if the fireman's rule were abolished. The fireman's rule shields a person from liability for his negligence only as it affects a fireman. As to anyone else who may be injured as a result of the same negligent conduct, breach of the duty to exercise reasonable care in preventing fires is sufficient to create liability.[87] Thus, if an individual did not breach the standard of reasonable care owed to nonfiremen for the prevention of fires, there would be no liability to a fireman injured while fighting a fire. Similar reasoning was employed by the courts in creating an exception to the original fireman's rule whereby an entering fireman was allowed to recover for injuries sustained upon an approach prepared for anyone entitled to enter.[88]

A consideration of the consequences to the community[89] of imposing a negligence standard on individuals who cause fires leading to a fireman's injuries also supports a result contrary to that achieved by the fireman's rule. By requiring a fireman to look solely to the public for

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PREVENTION AND CONTROL 5 (1973) [hereinafter cited as AMERICA BURNING].

82. *Id.* at 7.
83. *Id.* at 1-2.
84. See text accompanying note 38 *supra.*
85. See text accompanying note 64 *supra.*
86. 69 Cal. 2d at 118, 443 P.2d at 567, 70 Cal. Rptr. at 103.
87. See text accompanying notes 69-70 *supra.*
88. See text accompanying note 23 *supra.*
89. See text accompanying note 38 *supra.*

compensation for injuries, the fireman's rule imposes a burden on the community solely for the benefit of a negligent party, and is inconsistent with several legislative provisions relating to or affecting firemen. First, the workers' compensation laws do not preclude an injured fireman from pursuing a tort action against one other than his employer[90] since the "system was not designed to extend immunity to strangers."[91] The limited amounts payable under a workers' compensation plan[92] further suggest that an injured fireman should be allowed to recover from the tortfeasor the amount by which his damages exceed his award from the public fund.[93] Secondly, the state is provided a statutory right of reimbursement from tortfeasors for compensation[94] or retirement[95] benefits paid to injured state employees. To deny the fireman a cause of action is to deny the state its right of subrogation, thereby imposing the burden of compensating firemen for their injuries exclusively upon the public fund. Thirdly, Health and Safety Code Section 13009 expressly provides for the recovery, in certain instances, of firefighting expenses from one whose negligence was the proximate cause of the fire's origin or escape.[96] Since firefighting agencies are allowed to recover their costs under this section,[97] it seems incongruous, in light of the apparent legislative policy against underwriting tortfeasors with public funds, that the individual firefighter would be denied recovery.

The final consideration suggested by *Rowland* for determining whether an exception to the general liability principle should exist is the "availability, cost, and prevalence of insurance for the risk involved."[98] As with the examination of *Rowland*'s other criteria, lia-

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90. CAL. LABOR CODE §3852.

91. 2 A. LARSON, LAW OF WORKMEN'S COMPENSATION §71.00 (1975).

92. 3 A. LARSON, LAW OF WORKMEN'S COMPENSATION, Appendix B, Tables 8-11 (1973); CAL. LABOR CODE §§4658-4660. *See* Southeast Furniture Co. v. Barret, 24 Utah 2d 24, 27, 465 P.2d 346, 348 (1970) wherein the court noted that "workmen's compensation acts for one injured . . . [are] . . . comparably speaking . . . quite niggardly and unrealistic with respect to jury verdicts . . . ."

93. *See* 2 A. LARSON, LAW OF WORKMEN'S COMPENSATION §§71.00-71.20 (1975).

94. CAL. LABOR CODE §§3850-3864.

95. CAL. GOV'T CODE §§21450-21455.

96. Any person who *negligently*, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him to escape onto any forest, range or non-residential grass-covered land is liable for the expense of fighting the fire and such expense shall be a charge against that person. Such charge shall constitute a debt of such person, and is collectible by the person, or by the federal, state, county, public, or private agency, incurring such expenses in the same manner as in the case of an obligation under a contract, expressed or implied.

CAL. HEALTH & SAFETY CODE §13009 (emphasis added). In *Giorgi*, the state was allowed recovery under this provision. 266 Cal. App. 2d 355, 360, 72 Cal. Rptr. 119, 123 (1968).

97. People v. Williams, 222 Cal. App. 2d 152, 34 Cal. Rptr. 806 (1963); County of Ventura v. Southern Cal. Edison Co., 85 Cal. App. 2d 529, 193 P.2d 512 (1948).

98. See text accompanying note 38 *supra*.

bility is again indicated. Liability insurance is readily available to and increasingly utilized by those either occupying or dealing with real and personal property.[99] It is common knowledge that fire insurance, in the form of the standard homeowner's policy, must often be obtained as a prerequisite to the securing of financing for the purchase of private housing. Such insurance incorporates an incentive to maintain a reasonable degree of fire safety since the premium charged is determined by the risk attendant to the property. As in *Rowland*, "there is no persuasive evidence that applying ordinary principles of negligence law to the . . . [one responsible for the fire] will materially reduce the prevalence of insurance due to increased cost or even substantially increase the cost."[100]

There are other considerations which, although not included in *Rowland*'s criteria, seem pertinent to a discussion of the public policy basis for the fireman's rule. The first of these considerations involves the burden which the fireman's rule presently places on the fireman. As noted previously, the job of a fireman is extremely hazardous.[101] Yet the fireman is expected to face this hazard with substantially the same workers' compensation benefits as any other public employee who is not similarly handicapped in bringing a cause of action.[102] The maxi-

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99. INSURANCE INFORMATION INSTITUTE, INSURANCE FACTS 1974 13-14, 17 (1974).

> The question of sufficient liability insurance to cover the fire situation has arisen here. What the general custom was, if any, as to the reasonable amount of liability protection taken out in 1922 is one thing, and what is reasonable to-day [sic] is quite another thing. Modern appliances of the machine age have progressed so fast in this country that the idea of protection afforded by all kinds of insurance has made rapid strides. The man with the modern income nowadays is educated to secure greater liability protection.

In re Lathers' Will, 137 Misc. 226, 234, 243 N.Y.S. 366, 376 (Sur. Ct. 1930). *See* PROSSER, *supra* note 9, §§82-83, at 541-56. *See also* James, *Social Insurance and Tort Liability: The Problem of Alternate Remedies*, 27 N.Y.U.L. REV. 537 (1952).

100. 69 Cal. 2d at 118, 443 P.2d at 567-68, 70 Cal. Rptr. at 103-04.

101. See text accompanying note 76 *supra*.

102. Special benefit provisions for California firemen include the following: (1) California Labor Code Sections 4850 to 4855 provide that a public safety employee disabled by injury or illness arising out of and in the course of his duties may elect to take a leave of absence without loss of salary for up to one full year or until such earlier date as he is retired on permanent disability pension; (2) California Labor Code Section 212 provides that, as to various law enforcement and fire fighting officers, hernia, heart trouble, and pneumonia are "injuries" under the act and are presumed to arise out of and in the course of employment; (3) California Government Code Section 32354 provides a minimum fifty percent disability retirement benefit for firemen to a maximum of $250 per month.

"There is a great disparity among the several States as to the benefits which are provided to these courageous men and their survivors. Needless to say, in most cases the death and disability benefits which are provided are *extremely* inadequate." *Hearings on Death and Disability Benefits for Policemen and Firemen Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 92nd Cong., 2nd Sess., ser. 31, at 2 (1972) (emphasis added).

Workers' compensation coverage is provided for volunteer firemen by California Labor Code Section 3361. Additionally, individuals impressed into fighting forest or brush fires under Public Resources Code Sections 4153 or 4436, or who volunteer to fight or

mum recovery for permanent disability is $119 per week,[103] there is no recovery for pain and suffering,[104] and the dependents and/or heirs of a fireman are limited to recovery of a maximum death benefit of $45,000.[105]

A second consideration which is pertinent to an examination of the public policy basis for California's fireman's rule is that of all public servants, only firemen are deemed to be solely dependent upon the public treasury for compensation for injuries arising directly from their employment. This is aptly illustrated when firemen are compared to policemen, who rival firemen in terms of the frequency and severity of occupational injuries.[106] In *Bilyeu v. Standard Freight Lines*,[107] the defendant truck driver fell asleep, his truck overturned, and a load of steel rolls was spilled onto the highway. The plaintiff highway patrolman, acting under a legal duty to clear the hazard, severely injured himself in pushing the steel rolls to the side of the roadway and was allowed recovery against the defendant.[108] The status of the highway patrolman is indistinguishable from that of the firemen in *Giorgi* and *Scott*. All of the plaintiffs were injured as a result of "negligence in the creation of the very occasion for [their] engagement";[109] all were employed by public entities for the benefit of the public; all were engaged in employment with a clearly foreseeable risk of injury; and all were able to look to workers' compensation funds. That the *Bilyeu* decision is irreconcilable with the results reached in *Giorgi* and *Scott* suggests a potential problem in supporting, solely on the basis of public policy, the denial of a cause of action to a fireman.

The final public policy argument offered by the *Giorgi* court in support of the fireman's rule involved the efficient administration of justice.[110] The court expressed two considerations, the first being that since firemen are frequently injured, a limitation on liability would

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prevent fires at the request of a public officer or employee, are extended workers' compensation benefits by California Labor Code Sections 3365 or 3367. In the event of injury, California Labor Code Section 4458 provides a presumption of maximum average weekly earnings for the computation of both permanent and temporary disability compensation.

103. CAL. LABOR CODE §§4650-4663.

104. 1 A. LARSON, LAW OF WORKMEN'S COMPENSATION §2.40 (1972).

105. CAL. LABOR CODE §4702.

106. STANLEY H. RUTTENBERG & ASSOCIATES, INC., ECONOMIC JUSTICE: THE NEEDS OF FIRE FIGHTERS 21-25 (1970).

107. 182 Cal. App. 2d 536, 6 Cal. Rptr. 65 (1960).

108. *Id.*. at 540-41, 6 Cal. Rptr. at 67.

109. Giorgi v. Pacific Gas & Elec. Co., 266 Cal. App. 2d 355, 359, 72 Cal. Rptr. 119, 122 (1968) *and* Scott v. E.L. Yeager Constr. Co., 12 Cal. App. 3d 1190, 1195, 91 Cal. Rptr. 232, 235 (1970), *quoting* Krauth v. Geller, 31 N.J. 270, 274, 157 A.2d 129, 131 (1960).

110. 266 Cal. App. 2d at 360, 72 Cal. Rptr. at 122.

serve to restrict what otherwise could become an excessive burden on the courts.[111] The second consideration, closely allied to the first, was voiced as a concern that the adoption of a rule that extended liability to firemen would lead to other "obvious expansions" of liability and a concomitant increase in litigation.[112] Aside from the fact that the possibility of increased litigation is not a proper basis for the refusal to protect personal rights,[113] the *Giorgi* court itself pointed to several considerations which suggest that no unmanageable burden would be placed upon the judicial process if the fireman's rule was to be abrogated. The most significant of these considerations springs from the court's observation that while "[m]ost fires of any consequence result in injury [to some firemen], happily many of them [are] rather minor."[114] Presumably, the great majority of these injuries would be adequately covered by workers' compensation benefits, thereby decreasing the likelihood of suit by a fireman and facilitating a settlement between the workers' compensation carrier and the defendant and/or his liability insurance carrier.[115] In cases in which the firemen did pursue an individual action against a defendant, there would still be an incentive for settlement since the *Giorgi* court's concern that "[j]udicial determination of the cause of a fire . . . presents difficult problems requiring lengthy trials"[116] is mitigated by the fact that most fires are officially investigated as to cause.[117] Additionally, the fireman would not be inclined to pursue a less than substantial claim since his workers' compensation carrier would have a right of subrogation up to the amount of the benefits it had paid to him.[118] It is submitted that these

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111. *Id.*

112. *Id.* at 360, 72 Cal. Rptr. at 122-23.

113. Courts not only compromise their basic responsibility to decide the merits of each case individually but destroy the public's confidence in them by using the broad broom of "administrative convenience" to sweep away a class of claims a number of which are admittedly meritorious . . . . [W]e cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong.

Dillon v. Legg, 68 Cal. 2d 728, 737-39, 441 P.2d 912, 918-19, 69 Cal. Rptr. 72, 78-79 (1968).

114. 266 Cal. App. 2d at 360, 72 Cal. Rptr. at 122.

115. *See* CAL. GOV'T CODE §§21450-21455; CAL. LABOR CODE §§3850-3864.

116. 266 Cal. App. 2d at 360, 72 Cal. Rptr. at 122.

117. CAL. HEALTH & SAFETY CODE §13852(h); DEL. CODE ANN. tit. 16, §6607 (Cum. Supp. 1974); IOWA CODE ANN. §§100.1-100.3 (1972); OHIO REV. CODE ANN. §3737.08 (Page 1971); ORE. REV. STAT. §476.210 (1973).

118. That subrogation rights may be so extensive as to effectively extinguish an employee's cause of action is well illustrated by Bilyeu v. State Employees' Retirement System, 58 Cal. 2d 618, 375 P. 442, 25 Cal. Rptr. 562 (1962). The plaintiff police officer's entire recovery against the tortfeasor ($62,000) was absorbed by the state for compensation and retirement benefits paid, which led Justice Peters to remark in a concurring opinion:

As a result, plaintiff will receive no benefit at all from his tort action against the tortfeasor. He will receive not one penny for his pain and suffering. So

considerations, together with the difficulties normally encountered in maintaining a successful cause of action in negligence, would preclude an undue interference with the efficient administration of justice.

It can also be argued that abrogation of the fireman's rule would *not* result in the unwarranted expansion of liability perceived by the *Giorgi* court when it queried whether an ambulance driver could recover from a person who caused the accident which necessitated the ambulance driver's presence.[119] Abolition of the fireman's rule would simply remove an artificial bar to a fireman's right to recover for injuries *foreseeably* caused by another's negligence in starting a fire, whereas the ambulance driver's ability to recover could depend on resolution of a difficult proximate cause issue arising from the independent, intervening tortious conduct of another driver. Likewise, abrogation of the fireman's rule and restoration of a duty owed to firemen coming onto the scene of a fire would have little bearing on the issue of whether a patient in a hospital disease ward could be held liable to a hospital attendant for having "negligently" exposed himself to a contagious disease.[120] Resolution of the problem posed by the *Giorgi* court's second hypothetical would be predicated upon a determination of whether a *duty* exists to avoid exposure of oneself to contagious diseases. This determination, in turn, would depend upon the foreseeability of infecting others after negligent exposure of oneself to a contagious disease. No similar foreseeability problems appear to exist regarding the situation in which negligent maintenance of property leads to a fire which injures others.[121]

B. The Equal Protection Challenge

The effect of the *Giorgi, Scott,* and *Bilyeu* decisions is to create different classifications of persons who are similarly situated without affording equal treatment to those classes. On the one hand are firemen who are denied a cause of action for "negligence in the creation of the very occasion for [their] engagement,"[122] and on the other are all other public employees who are not similarly denied the right to their causes of action. Accordingly, it may be argued that there is a viola-

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far as he is concerned, he should never have filed the tort action. In the future, there will be no inducement for state employees in the position of plaintiff to file such actions.

Id. at 629, 375 P.2d at 449, 25 Cal. Rptr. at 569.

119. See text accompanying note 62 *supra.*

120. See text accompanying note 62 *supra.*

121. See text accompanying notes 68-73 *supra.*

122. See authorities cited note 109 *supra.*

tion of the equal protection provisions of the United States[123] and California[124] Constitutions. Resolution of this argument is dependent upon the degree of scrutiny with which the justifications for the fireman's rules are examined, which in turn is dependent upon the type of interest affected by the challenged law. The fireman's rule is not based upon a "suspect classification"[125] such as race,[126] alienage,[127] or nationality,[128] nor does it affect a "fundamental freedom" such as the right to vote,[129] the right to worship freely,[130] or the right to travel from one state to another,[131] in which case it would be subject to strict judicial scrutiny requiring a demonstration that the classification was "necessary" to promote a "compelling state interest."[132] Since the fireman's rule is principally based upon economic considerations, traditional equal protection analysis would evaluate its justification under the more lenient "rational basis" test which has been described by the United States Supreme Court as follows: "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the equal protection clause only if based on reasons *totally unrelated* to the pursuit of that goal."[133] Classifications created by a judicial rule are equally susceptible to an equal protection challenge.[134]

Since the rational basis test requires little more than a "rhyme or reason"[135] for the classification, the fireman's rule would probably be

123. "[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

124. "All laws of a general nature shall have a uniform operation." CAL. CONST. art. I, §11. "No . . . citizen, or class of citizens, [shall] be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." CAL. CONST. art. I, §21.

125. *See generally* Shapiro v. Thompson, 394 U.S. 618, 658-59 (1969) (Harlan, J., dissenting).

126. McLaughlin v. Florida, 379 U.S. 184 (1964).

127. Graham v. Richardson, 403 U.S. 365 (1971).

128. Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944).

129. Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Board of Elections, 383 U.S. 663 (1966).

130. Sherbert v. Verner, 374 U.S. 398 (1963).

131. Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160 (1941).

132. Shapiro v. Thompson, 394 U.S. 618, 634, 644 (1969); NAACP v. Alabama, 357 U.S. 449, 463 (1958).

133. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) (emphasis added).

134. "The constitutional mandate to maintain equality before the law and equal laws rests upon the judicial department of government with as much force as upon the other departments." Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 320, 184 N.E. 152 161 (1933) (citations omitted). *See* Cooper v. Aaron, 358 U.S. 1 (1958); Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Ladner v. Siegel, 298 Pa. 487, 148 A. 699 (1930).

135. Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

upheld as constitutional for the reasons advanced by the *Giorgi* court; namely, the public policy considerations of distribution of cost and avoidance of an undue expansion of litigation.[136] Recently, however, it has been argued[137] that this traditional approach toward essentially economic classifications has given way to a more demanding equal protection analysis first articulated by the United States Supreme Court in *Reed v. Reed*.[138] In that case, which dealt with a statute giving preference to a male relative when both a male and a female of the same degree of kinship sought appointment as administrator of an intestate's estate, the state's justifications for the statute failed. Though subsequent cases debate the scope of *Reed*'s rational basis test,[139] it was used to defeat California's automobile guest statute in *Brown v. Merlo*.[140] Since *Brown* constitutes the most recent statement of California's rational basis test, the fireman's rule should be evaluated in light of this decision.

The *Brown* court set forth its test as follows:

> [T]he principle of "equal protection" preserved by both state and federal Constitutions, of course, "does not preclude the state from drawing any distinctions between different groups of individuals," but it does require that, at a minimum, "persons similarly situated with respect to the legitimate purpose of the law receive like treatment."
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> . . . "*A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.*'" Thus, when a statute provides that one class shall receive different treatment than another, our constitutional provisions demand more "than nondiscriminatory application within the class . . . establish[ed]. [They] also [impose] a requirement of some rationality in the nature of the class singled out."[141]

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136. *Cf.* Tammen v. County of San Diego, 66 Cal. 2d 468, 426 P.2d 753, 58 Cal. Rptr. 249 (1966); Dias v. Eden Township Hosp. Dist., 57 Cal. 2d 502, 370 P.2d 334, 20 Cal. Rptr. 630 (1962); Lewis v. City & County of San Francisco, 21 Cal. App. 3d 339, 98 Cal. Rptr. 407 (1971); Wadley v. County of Los Angeles, 205 Cal. App. 2d 668, 23 Cal. Rptr. 154 (1962).

137. *See* Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

138. 404 U.S. 71 (1971).

139. While the Court has never delineated the *Reed* rationale as a third test per se, it appears to have applied it under the mantle of the rational basis test. *See, e.g.*, O'Brien v. Skinner, 414 U.S. 524 (1974); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); James v. Strange, 407 U.S. 128 (1972). *Compare* Frontiero v. Richardson, 411 U.S. 677 (1973) *with* O'Neill v. Dent, 364 F. Supp. 565 (E.D.N.Y. 1973).

140. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

141. *Id.* at 861, 506 P.2d at 216, 106 Cal. Rptr. at 392 (citations omitted).

The fireman's rule establishes two distinct classifications which are justified in the *Giorgi* and *Scott* opinions by the public policy arguments previously analyzed.[142] The first argument proffered involved the fairness consideration, *i.e.* it is not fair for the fireman to complain of injuries sustained in the very occasion of his employment.[143] As seen earlier, this is not really a reason for the rule but a conclusion of its application.[144] In the context of equal protection it is not a purpose, but a result. To justify a classification on no better grounds than that it is "fair" partakes of arbitrariness, and such a justification does not seem to afford a rational basis for refusing to permit firemen to recover for injuries while permitting all other public employees to do so.

The second justification advanced by *Giorgi* was that it would be too burdensome to require the tortfeasor to bear the cost of firemen's injuries when it could be more effectively distributed over those benefiting from the provision of fire fighting services.[145] This particular justification for the rule should be examined in light of the common law tenet reaffirmed in *Brown v. Merlo* which maintains that " '[w]hen the reason of a rule ceases, so should the rule itself.' "[146] The *Rowland* decision serves as a prime example of the application of this tenet of common law, as the court, in abolishing the trespasser-licensee-invitee classification scheme as irrational in contemporary society, declared that "[a] man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose."[147] This reasoning is equally appropriate for firemen since their right to compensation for negligently inflicted injuries is no less worthy of protection merely because of their status as firemen. A further application of the common law tenet was made in *Brown* when it was held that the automobile guest statute no longer afforded protection to the generous host, but to his insurance company. The increased prevalence of automobile liability insurance, which effectively distributes the risk of loss over the motoring public, underlay the court's conclusion that "[t]he policy concept that it is unfair to shift the burden from the injured person to his host . . . is no longer applicable."[148] This result is analogous to

142. See text accompanying notes 67-121 *supra.*
143. See authorities cited note 109 *supra.*
144. See text accompanying notes 50-57 *supra.*
145. 266 Cal. App. 2d 355, 360, 72 Cal. Rptr. 119, 122.
146. 8 Cal. 3d at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397, *quoting* CAL. CIV. CODE §3510.
147. 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 105 (1968).
148. 8 Cal. 3d at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397, *quoting* McConville v. State Farm Mutual Auto. Ins. Co., 15 Wis. 2d 374, 383, 113 N.W.2d 14, 19 (1962).

that of the fireman's rule wherein the burden is not shifted from the tortfeasor to the public, as envisioned by the *Giorgi* court, but to the fireman. This misallocation of the burden of compensating for firemen's injuries derives from the present inadequacy of statutory levels of compensation.[149] Liability insurance would effectively place the burden upon the public. Upon this analysis of the distribution of cost rationale for the fireman's rule, it must be concluded that there is an insubstantial relationship between the justification and the classification.

A final argument offered by the *Giorgi* court in support of the fireman's rule concerned the efficient administration of justice.[150] The previous discussion has suggested that this consideration is inadequate justification for a rule which denies protection of substantial personal rights.[151] Furthermore, the *Giorgi* court's concern that an unwarranted expansion of liability would arise in the absence of a fireman's rule is misplaced to the extent that it fails to consider the restraints imposed on liability by the actionable negligence elements of duty and proximate cause.[152] The *Brown* decision inferentially supports the conclusion that *Giorgi*'s efficient administration of justice rationale is insufficient justification for the classification of firemen. In *Brown* the California Supreme Court declared as irrational

> a rule which, in order to prevent collusive lawsuits, broadly eliminates causes of action of an entire class of individuals, some of whom may institute collusive suits, but many of whom have entirely valid causes of action. This court, indeed, over the past two decades, has decided a series of cases which have rejected just such a rationale.[153]

Similarly, the fireman's rule, which is intended in part to prevent an undue expansion of liability and an increased workload on the judicial system, broadly eliminates causes of action by all firemen although many firemen's claims might be settled and many others which were brought to trial might not require the lengthy trials envisioned by *Giorgi*.

CONCLUSION

Although the courts have been virtually unanimous in denying a paid fireman a cause of action against one whose negligence caused the fire

149. See text accompanying notes 101-105 *supra*.
150. 266 Cal. App. 2d 355, 360, 72 Cal. Rptr. 119, 122.
151. See text accompanying notes 110-118 *supra*.
152. See text accompanying notes 119-121 *supra*.
153. 8 Cal. 3d at 874, 506 P.2d at 255 106 Cal. Rptr. at 401.

in which he was injured, the rationale has traditionally been expressed in terms of occupier immunity or assumption of risk. Not having these theories available,[154] the *Giorgi* court considered several public policy factors which it deemed to weigh sufficiently in favor of the "fireman's rule." While these policy considerations have obvious merit, the foregoing discussion has raised countervailing considerations which appear to have transcending importance. Most importantly, the fireman should not be compelled to bear an inordinate and unnecessary burden of loss. The compensation he presently receives from the public is often inadequate protection against the inherent risks of his profession. If the fireman's rule is to be maintained, consideration should be given to providing increased financial benefits uniquely available to the fireman so that he is afforded protection at least equal to that of other public employees.

The better solution, however, would appear to be to abolish the rule and give firemen a cause of action in their own right. This would help alleviate the burden on an already strapped public fund[155] while contributing to the public incentive to practice active fire prevention. Additionally, the utilization of private liability insurance, which was apparently not considered by the *Giorgi* court, would appear to be the most equitable means of placing the burden for negligently caused fire losses upon those most directly responsible. Granting the fireman a cause of action in negligence would neither add unreasonably to the burden imposed on occupier or nonoccupier defendants nor unduly interfere with the efficient administration of justice. Apart from public policy considerations which militate against the continued existence of the fireman's rule, there appear to be sufficient grounds to argue for abrogation of the fireman's rule on the basis of an equal protection challenge. Of all public employees, only fireman are denied a cause of action for injuries sustained in the course of their employment. Under the stricter mode of judicial scrutiny of economic classifications suggested by the *Reed* and *Brown* decisions, the justifications for the fireman's rule promulgated by the *Giorgi* and *Scott* courts appear to be insufficient to uphold the classification which the fireman's rule creates.

As an alternative to abrogation of the fireman's rule, and the resulting unrestricted right to a cause of action in negligence by the fireman, it should be noted that a well drawn statute could afford firemen sub-

154. See text accompanying notes 45-46 *supra.*
155. AMERICA BURNING, *supra* note 81, at 5.

stantial protection from some of the more serious risks of the profession while simultaneously increasing the incentive for fire prevention. Most aptly illustrative of this approach is section 205-a of the New York General Municipal Law[156] which provides for recovery by firemen or their heirs of specified minimum sums of money in cases of injury or death resulting from a fire caused by the negligence of a person in failing to comply with any applicable statute, fire rule, ordinance, or other fire regulation. This type of statute provides a partial solution to the inability of firemen to recover against the culpable party for injuries sustained in the course of fighting a negligently created fire, since it provides for recovery in situations in which a fire resulted from violation of a statute or regulation designed to promote fire safety. Since California has numerous statutory and administrative provisions aimed at promoting fire safety,[157] consideration might be given to enactment of a statute similar to the New York General Municipal Law. Such a statute would offer partial relief to California firemen who are presently denied full and effective compensation for their injuries by operation of the fireman's rule.

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156. In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, wilful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge of performance of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department, or pay to the wife and children, or to pay to the parents, or to pay to the brothers and sisters, being the surviving heirs-at-law of any deceased person thus having lost his life, a sum of money, in case of injury to persons, not less than one thousand dollars, and in case of death not less than five thousand dollars, such liability to be determined and such sums recovered in an action to be instituted by any person injured or the family or relatives of any person killed as aforesaid.
N.Y. GEN. MUNIC. LAW §205-a (McKinney 1974).

157. *E.g.*, CAL. HEALTH & SAFETY CODE §13000 *et seq.*; SACRAMENTO COUNTY CODE §17.04 *et seq.*